



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2013-0211, EPA-R03-OAR-2013-0510; FRL-9917-17-Region 3]

**Approval and Promulgation of Air Quality Implementation Plans;
Virginia; Section 110(a)(2) Prevention of Significant Deterioration Requirements for the
2008 Ozone and 2010 Nitrogen Dioxide National Ambient Air Quality Standards**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving revisions to the Virginia State Implementation Plan (SIP) pursuant to the Clean Air Act (CAA). Whenever new or revised National Ambient Air Quality Standards (NAAQS) are promulgated, the CAA requires states to submit a plan for the implementation, maintenance, and enforcement of such NAAQS. The plan is required to address basic program elements, including, but not limited to, regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure attainment and maintenance of the standards. These elements are referred to as infrastructure requirements. The Commonwealth of Virginia has made two separate submittals addressing the infrastructure requirements for the 2008 ozone and 2010 nitrogen dioxide (NO₂) NAAQS. This action approves the prevention of significant deterioration (PSD) portions of the infrastructure requirements of the CAA for the Commonwealth's SIP submittals for the 2008 ozone and 2010 NO₂ NAAQS.

DATES: This final rule is effective on **[insert date 30 days from date of publication]**.

ADDRESSES: EPA has established two dockets for this action under Docket ID Numbers EPA-R03-OAR-2013-0211 for the 2008 ozone docket and EPA-R03-OAR-2013-0510 for the

2010 NO₂ docket. All documents in the docket are listed in the www.regulations.gov website. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Ellen Schmitt, (215) 814-5787, or by e-mail at schmitt.ellen@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On May 21, 2014, EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. 79 FR 29142. In the NPR, EPA proposed approval of the infrastructure elements of section 110(a)(2)(C), (D)(i)(II), and (J) of the CAA as they relate to Virginia's PSD program for the 2008 ozone and 2010 NO₂ NAAQS. The formal SIP revisions were submitted by Virginia on July 23, 2012 and May 30, 2013 for the 2008 ozone and the 2010 NO₂ NAAQS, respectively.

The July 23, 2012 and May 30, 2013 Virginia infrastructure SIP submissions indicated that the approved Virginia SIP (plus measures submitted but not yet fully approved by EPA for the SIP)

addressed requirements for a PSD program as required for section 110(a)(2)(C), (D)(i)(II) and (J) of the CAA.¹ In Virginia, construction and modification of stationary sources are covered under Article 8, Permits for Major Stationary Sources and Major Modifications Locating in Prevention of Significant Deterioration Areas (9VAC5-80-1605 et seq.) which is included in the approved Virginia SIP. *See* 40 CFR 52.2420(c). Article 8 also requires that construction and modification of major stationary sources will not cause or contribute to a violation of any NAAQS (9VAC5-80-1635, Ambient Air Increments and 9VAC5-80-1645, Ambient Air Ceilings) and requires application of Best Available Control Technology (BACT) to new or modified sources (9VAC5-80-1705, Control Technology Review). On August 5, 2011, Virginia submitted a revision to its SIP which incorporated preconstruction permitting requirements for sources of fine particulate matter (PM_{2.5}) into Virginia's PSD program. Subsequent to Virginia's submittal, two decisions by the United States Court of Appeals for the D.C. Circuit addressed the Federal PM_{2.5} program and impacted EPA's ability to fully approve the PSD SIP revisions submitted by Virginia.² Virginia consequently submitted additional revisions to its PSD program addressing preconstruction permitting requirements for sources of PM_{2.5}. On February 25, 2014, EPA fully approved these revisions to Virginia's PSD program. 79 FR 10377. With these revisions fully approved, Virginia's SIP-approved PSD program now contains all of the emission limitations, control measures, and other program elements required by the CAA and 40 CFR 51.166 for all required pollutants, including PM_{2.5}. *Id.* (also approving Virginia's infrastructure SIP submittals

¹ Virginia's July 23, 2012 infrastructure SIP submission for the 2008 ozone NAAQS cited to Virginia's existing approved PSD program to address section 110(a)(2) requirements for PSD. However, the May 30, 2013 infrastructure SIP submission for the 2010 NO₂ NAAQS cited to Virginia's existing approved PSD program plus additional regulatory provisions submitted to EPA but not yet fully approved into the SIP to address section 110(a)(2) requirements for PSD.

² *See Natural Resources Defense Council v. EPA*, 706 F.3d 428 (D.C. Cir. 2013) (remanding EPA's rules implementing the 1997 PM_{2.5} NAAQS, including the 2008 rule, "Implementation of New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5})"), and *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013) (vacating and remanding provisions at 40 CFR 51.166(i)(5), (k)(2) and 52.21(i)(5), (k)(2) relating to PM_{2.5} significant impact levels and significant monitoring concentrations for PSD).

for the 1997 8-hour ozone and PM_{2.5} NAAQS, the 2006 PM_{2.5} NAAQS, and the 2008 lead NAAQS for PSD requirements in section 110(a)(2) of the CAA).

Section 110(a)(2)(C) of the CAA requires each state's SIP to "include a program to provide for...regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to ensure that national ambient air quality standards are achieved, including a permit program as required in...this subchapter." Similarly, section 110(a)(2)(J) requires that for each NAAQS the state's SIP must "meet the applicable requirements of...part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection)." Section 110(a)(2)(D)(i)(II) of the CAA requires each state's SIP to include provisions which will prevent emissions from within the state interfering with the measures required by another state for implementing PSD. As discussed in EPA's May 21, 2014 NPR, when reviewing infrastructure SIP submittals, EPA focuses on the structural PSD program requirements contained in part C as well as EPA's PSD regulations. These structural requirements call for the PSD program to address all NSR pollutants, including greenhouse gases (GHGs).

On June 23, 2014, the United States Supreme Court issued a decision addressing the application of PSD permitting requirements to GHG emissions. *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S.Ct. 2427. The Supreme Court said that EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source required to obtain a PSD permit. The Court also said that EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of BACT. In order to act consistently

with its understanding of the Court's decision pending further judicial action to effectuate the decision, EPA is not continuing to apply EPA regulations that would require that SIPs include permitting requirements that the Supreme Court found impermissible. Specifically, EPA is not applying the requirement that a state's SIP-approved PSD program require that sources obtain PSD permits when GHGs are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (*e.g.* 40 CFR 51.166(b)(48)(v)). EPA anticipates a need to revise federal PSD rules in light of the Supreme Court opinion. In addition, EPA anticipates that many states will revise their existing SIP-approved PSD programs in light of the Supreme Court's decision. The timing and content of subsequent EPA actions with respect to EPA regulations and state PSD program approvals are expected to be informed by additional legal process before the United States District Court for the District of Columbia Circuit. At this juncture, EPA is not expecting states to have revised their PSD programs for purposes of infrastructure SIP submissions and is only evaluating such submissions to assure that the state's program correctly addresses GHGs consistent with the Supreme Court's decision.

As discussed in the May 21, 2014 NPR and herein, EPA finds Virginia's approved SIP meets the statutory obligations relating to a PSD permit program required by section 110(a)(2)(C), (D)(i)(II), and (J) of the CAA for the 2008 ozone and 2010 NO₂ NAAQS. *See* 79 FR 10377 (providing full approval to Virginia's PSD program as addressing requirements in the CAA and in 40 CFR 51.166). The detailed rationale for EPA's action is explained in the NPR and will not be restated here. With respect to GHGs, EPA has determined that Virginia's SIP is currently sufficient to satisfy section 110(a)(2)(C), (D)(i)(II), and (J) of the CAA for the 2008 ozone and 2010 NO₂ NAAQS because the PSD permitting program previously approved by EPA into the

SIP continues to require that PSD permits (otherwise required based on emissions of pollutants other than GHGs) contain limitations on GHG emissions based on the application of BACT.

Although Virginia's approved PSD permitting program may currently contain provisions that are no longer necessary in light of the Supreme Court decision, this does not render the infrastructure SIP submission inadequate to satisfy section 110(a)(2)(C), (D)(i)(II), and (J). As previously mentioned, the Virginia SIP currently contains the necessary PSD requirements and the application of those requirements is not impeded by the presence of other previously approved provisions regarding the permitting of sources of GHGs that, in light of the Supreme Court decision, EPA does not consider necessary at this time. Accordingly, the Supreme Court decision does not affect EPA's proposed approval of Virginia's infrastructure SIP as it relates to section 110(a)(2)(C), (D)(i)(II), and (J).

II. Summary of SIP Revision

On July 2, 2013, EPA proposed approval of the 2008 ozone submittal for the following infrastructure elements: Section 110(a)(2)(A), (B), (C) (for enforcement and regulation of minor sources and minor modifications), (D)(i)(II) (for visibility protection), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J) (relating to consultation, public notification, and visibility protection requirements), (K), (L), and (M). 78 FR 39651. Subsequently, EPA published a Final Rulemaking Notice (FRN) on March 27, 2014, which approved the Virginia 2008 ozone submittal for those specific elements. 79 FR 17043.

On August 5, 2013, EPA proposed approval of the 2010 NO₂ submittal for the following infrastructure elements: Section 110(a)(2)(A), (B), (C) (for enforcement and regulation of minor sources and minor modifications), (D)(i)(II) (for visibility protection), (D)(ii), (E)(i), (E)(iii), (F),

(G), (H), (J) (relating to consultation, public notification, and visibility protection requirements), (K), (L), and (M). 78 FR 47264. Subsequently, on March 18, 2014, EPA published a FRN which approved the Virginia 2010 NO₂ submittal for those specific elements. 79 FR 15012.

In both EPA's March 27, 2014 and March 18, 2014 FRNs, EPA indicated that it was taking separate action on certain infrastructure elements from Virginia's infrastructure SIP submittals as they related to PSD and section 128 of the CAA. This final rulemaking action approves the infrastructure elements of section 110(a)(2)(C), (D)(i)(II), and (J) of the CAA as they relate to Virginia's PSD program for the 2008 ozone and 2010 NO₂ NAAQS. EPA will take later separate action on section 110(a)(2)(E)(ii) of the CAA as it relates to section 128 for the 2008 ozone and 2010 NO₂ NAAQS.

III. Public Comments

EPA received two comments on the May 21, 2014 NPR proposing approval of Virginia's July 23, 2012 and May 30, 2013 SIP submissions addressing the PSD infrastructure elements for the 2008 ozone and 2010 NO₂ NAAQS. A full set of the comments is provided in the docket for this final rulemaking action. A summary of each comment and the EPA's response is provided in this section.

Comment: One commenter stated, "[t]hese regulations will destroy the cheap coal energy for our population" and requested a new President to reverse EPA's climate change policies. The commenter also suggested EPA should "go through Congress," presumably on climate change issues.

EPA Response: EPA thanks the commenter for the concerns expressed. However, the comments are not germane to the present rulemaking. This rulemaking action approves

Virginia's infrastructure SIP submittals for the 2008 ozone and 2010 NO₂ NAAQS as fully addressing the PSD program requirements in section 110(a)(2)(C), (D)(i)(II), and (J) of the CAA for the 2008 ozone and 2010 NO₂ NAAQS. While Virginia's SIP-approved PSD program includes greenhouse gases as a regulated pollutant, EPA is not approving those provisions in this rulemaking action. The commenter's concerns regarding coal energy and EPA's actions on climate change issues are irrelevant to this rulemaking action, and therefore no further response is required.

Comment: Another commenter remarked on Virginia's environmental assessment (audit) "privilege" discussed in Section III of EPA's May 21, 2014 NPR under "General Information Pertaining to SIP Submittals from the Commonwealth of Virginia," which is also included in Section IV of this rulemaking action. The commenter stated he wrote "to support the docket as written" and stated there needs to be a sufficient level of disclosure of emissions in environmental law to ensure emission limits are met. The commenter also stated that the Commonwealth of Virginia's laws seem to meet this standard, and therefore the commenter supported "their proposal."

EPA Response: In this rulemaking action, EPA is approving Virginia's infrastructure SIP submissions as meeting PSD requirements in section 110(a)(2)(C), (D)(i)(II) and (J) of the CAA for the 2008 ozone and 2010 NO₂ NAAQS. EPA is not approving any Virginia privilege or immunity law into the Virginia SIP nor taking any rulemaking action on any such Virginia provisions. As discussed in the NPR and in Section V of this rulemaking action, Virginia's law regarding an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity provides a privilege that protects from disclosure documents and

information that are the product of a voluntary environmental assessment. As discussed in the NPR and in Section IV of this rulemaking action, the Virginia Attorney General's January 12, 1998 opinion stated that Virginia's audit privilege law is inapplicable to enforcement of any Federally authorized program, since "no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity." EPA has determined that Virginia's privilege and immunity statutory provision will not preclude the Commonwealth from enforcing its PSD program consistent with the Federal requirements, and EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and has no impact on Federal enforcement authorities. However, in this rulemaking action, EPA is not approving any of Virginia's privilege and immunity statutory provisions into the Virginia SIP, and our discussion merely provides EPA's long-held interpretation of Virginia's statutory privilege provision as not impacting enforcement of the CAA or interfering with Federally required programs such as a PSD permits program. While the commenter is mistaken regarding the substance of our rulemaking action here, the commenter did not disagree with EPA. Thus, EPA thanks the commenter for his input. As the comment is not related to this rulemaking action which approves Virginia's SIP submissions as meeting PSD requirements of section 110(a)(2) of the CAA for the 2008 ozone and 2010 NO₂ NAAQS, no further response is required.

IV. Final Action

EPA is approving the formal SIP revisions submitted by Virginia on July 23, 2012 for the 2008 ozone NAAQS and May 30, 2013 for the 2010 NO₂ NAAQS as they meet the infrastructure requirements relating to a PSD permit program pursuant to section 110(a)(2)(C), (D)(i)(II), and (J) of the CAA.

V. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia’s Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by Federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts...” The opinion concludes that “[r]egarding § 10.1-

1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.”

Virginia’s Immunity law, Va. Code Sec. 10.1-1199, provides that “[t]o the extent consistent with requirements imposed by Federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its PSD program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

VI. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in

the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days from date of publication of this document in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action, approving Virginia's July 23, 2012 SIP submission for the 2008 ozone NAAQS and May 30, 2013 SIP submission for the 2010 NO₂ NAAQS as meeting the PSD elements in section 110(a)(2) of the CAA, may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: September 9, 2014.

William C. Early, Acting
Regional Administrator,
Region III.

Therefore, 40 CFR part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart VV—Virginia

2. In §52.2420:

a. In the table in paragraph (e), revise the entry for “Section 110(a)(2) Infrastructure Requirements for the 2010 Nitrogen Dioxide NAAQS.”

b. In the table in paragraph (e), revise the entry for “Section 110(a)(2) Infrastructure Requirements for the 2008 Ozone NAAQS.”

The revisions read as follows:

§52.2420 Identification of plan.

* * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * *	* *	* *	*	
Section 110(a)(2) Infrastructure Requirements for the 2010 Nitrogen Dioxide NAAQS	Statewide	5/30/13	3/18/14, 79 FR 15012	This action addresses the following CAA elements, or portions thereof: 110(a)(2) (A), (B), (C), (D)(i)(II), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M) with the exception of PSD elements.

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
			<u>[Insert the date of publication in the Federal Register]</u> <u>[Insert Federal Register citation]</u>	This action addresses the following CAA elements, or portions thereof: 110(a)(2)(C), (D)(i)(II), and (J) with respect to the PSD elements.
Section 110(a)(2) Infrastructure Requirements for the 2008 Ozone NAAQS	Statewide	7/23/12	3/27/14, 79 FR 17043 <u>[Insert the date of publication in the Federal Register]</u> <u>[Insert Federal Register citation]</u>	<p>This action addresses the following CAA elements, or portions thereof: 110(a)(2) (A), (B), (C), (D)(i)(II), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M) with the exception of PSD elements.</p> <p>This action addresses the following CAA elements, or portions thereof: 110(a)(2)(C), (D)(i)(II), and (J) with respect to the PSD elements.</p>
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[FR Doc. 2014-23106 Filed 09/29/2014 at 8:45 am; Publication Date: 09/30/2014]